

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE THE MATTER OF THE ACTIVITIES )  
OF THE DEPARTMENT OF NATURAL )  
RESOURCES AND CONSERVATION )

**RECEIVED**

APR 06 2006

**Montana Water Court**

**MONTANA STOCKGROWERS ASSOCIATION'S RESPONSE TO  
COMMENTS AND OBJECTIONS OF MONTANA DEPARTMENT OF  
FISH, WILDLIFE & PARKS TO FINAL PROPOSED WATER RIGHT  
CLAIM EXAMINATION RULE 27(h)(5)**

APPEARANCES:

John E. Bloomquist  
Doney Crowley Bloomquist Payne Uda, P.C.  
P.O. Box 1185  
Helena, MT 59624-1185  
*Attorneys for Montana Stockgrowers Assoc.*

G. Steven Brown  
Retained Counsel  
1313 Eleventh Avenue  
Helena, Montana 59601  
*Attorney for Montana Dept.  
of Fish, Wildlife and Parks*

Robert N. Lane  
Chief Legal Counsel  
Department of Fish, Wildlife and Parks  
P.O. Box 200701  
Helena, MT 59620-0701  
*Attorney for Montana Department  
of Fish, Wildlife and Parks*

C. Bruce Loble  
Chief Water Judge  
Montana Water Court  
P.O. Box 1389  
Bozeman, Mt 59771-1389  
*Petitioner*

Tim D. Hall  
Chief Legal Counsel  
Dept. of Natural Resources & Conservation  
1424 9<sup>th</sup> Avenue  
Helena, MT 59620-1601  
*Attorney for Montana Department of  
Natural Resources and Conservation*

The Montana Stockgrowers Association (“MSGA”), by and through its undersigned counsel, hereby submit the following response to the Montana Department of Fish, Wildlife and Parks (“DFWP”) comments and objections to the Proposed Water Right Examination Rule 27(h)(5). For the reasons set forth by this Court in Matter of Adjudication of Existing Rights in Basin 41I, 311 Mont. 327, 55P. 3d 396 (2002) (hereinafter “Bean Lake III”), DFWP’s objection to the proposed Rule 27(h)(5) should be unpersuasive.

From a review of DFWP’s filing, it appears the agency’s objection to proposed Rule 27(h)(5) is, in effect, an objection to the opinion of this Court on how the Water Court would proceed in regard to recreation, fish and wildlife claims. As to such claims, this Court stated that “..... the Water Court is instructed to identify, review and hold hearings in a matter similar to Adjudication of Water Rights of Yellowstone River, 253 Mont. 167, 832 P. 2d 1210 (1992), on all pre-1973 recreation, fish and wildlife claims, both diversionary and non-diversionary, and determine the validity of such claims under the holding herein.” See, Bean Lake III, ¶41.

The proposed Water Court Rule 27(h)(5) does what this Court clearly instructed for pre-1973 recreation, fish and wildlife claims; both diversionary and non-diversionary. In addition, as the Bean Lake III Court also recognized, the Water Court has the authority to include potential issue remarks in its rulings.

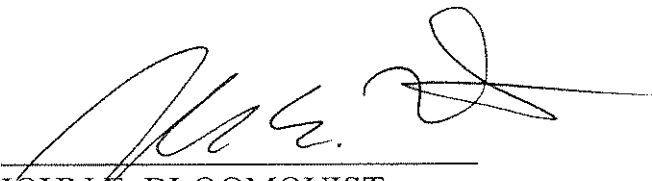
Bean Lake III, ¶45. The proposed rule is simply a remark the Water Court will place on wildlife, recreation, and fish and wildlife claims, under the Water Court's recognized authority and, as directed by this Court in the Bean Lake III holding.

If DFWP objects to this Court's direction on how the Water Court would handle such claims, DFWP could have filed a petition for rehearing in the Bean Lake III case under Rule 34, M.R. App. P., or sought clarification from the Court on the instructions to the Water Court. DFWP did neither. All other interested parties and *amici*, in the Bean Lake III decision, have simply relied upon this Court's ruling, including the Court's directives to the Water Court that hearings be conducted. As such, the clear instructions to the Water Court, from this Court, should stand as set forth in the proposed Water Right Claim Examination Rule.

### CONCLUSION

Proposed Rule 27(h)(5) is consistent with this Court's ruling and instruction to the Water Court on wildlife, recreation, and fish and wildlife claims. DFWP's objections to the proposed rule should be denied.

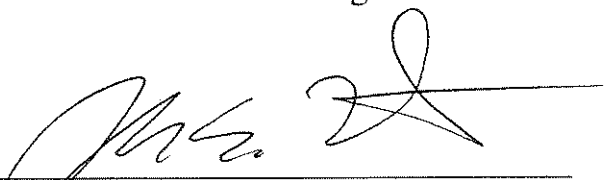
RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of April, 2006.



JOHN E. BLOOMQUIST  
Doney Crowley Bloomquist Payne Uda, P.C.  
P.O. Box 1185  
Helena, MT 59624-1185  
*Attorney for Montana Stockgrowers Assoc.*

## CERTIFICATE OF COMPLIANCE

In compliance with M.R.App.P. Rule 27(d)(iv), the undersigned certifies that the forgoing *Montana Stockgrowers Association's Response to Comments and Objections of Montana Department of Fish, Wildlife and Park to Proposed Water Right Claim Examination Rule 27(h)(5)* is printed proportionately spaced, in Times New Roman typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word is 423 words and averages less than 280 words per page, excluding this certificate of compliance and the following certificate of service.



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JOHN E. BLOOMQUIST  
Doney Crowley Bloomquist Payne Uda, P.C.  
P.O. Box 1185  
Helena, MT 59624-1185  
*Attorney for Montana Stockgrowers Assoc.*

**CERTIFICATE OF SERVICE**

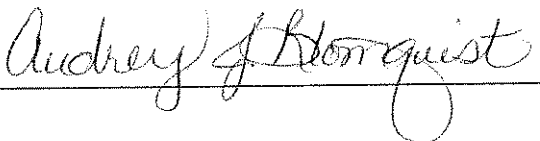
The undersigned certifies that on the 5<sup>th</sup> day of April, 2006, a copy of the *Montana Stockgrowers Association's Response to Comments and Objections of Montana Department of Fish, Wildlife and Park to Proposed Water Right Claim Examination Rule 27(h)(5)*, was served by U.S. first class mail , postage prepaid, upon the following:

Robert N. Lane  
Chief Legal Counsel  
Department of Fish, Wildlife and Parks  
P.O. Box 200701  
Helena, MT 59620-0701  
*Attorney for Montana Department  
of Fish, Wildlife and Parks*

Tim D. Hall  
Chief Legal Counsel  
Dept. of Natural Resources & Conservation  
1424 9<sup>th</sup> Avenue  
Helena, MT 59620-1601  
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\_\_\_\_\_  
Audrey J. Ronquist